SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA
VERSUS
JOSEPH MARSHALL

NO. 81–KA–0426

May 17, 1982

On Appeal from the Criminal District Court
Parish of Orleans
Honorable Alvin V. Oser, Judge

BLANCHE, Justice.

Defendant, Joseph Marshall, was convicted of first degree murder, a violation of R. S. 14:30. Following the jury's unanimous recommendation of capital punishment, Marshall was sentenced to death. Defendant appeals his conviction and sentence, urging twenty assignments of error. Finding reversible merit as to one of these assignments, we pretermit consideration of the remaining errors assigned by defendant.

Three visitors to the City of New Orleans, Max Minnig, Ray Saunders and Mary Jo Saunders, left their hotel, intending to walk to a nearby restaurant for dinner. When the three got lost in a local housing project, they asked for directions from three youths: Joseph Marshall, Kevin Marshall and James Jones. Though the Marshalls, who are not related, misdirected them, the trio were able to obtain proper instructions from another local resident. The visitors attempted to leave the housing project area when they were overtaken by one of the three youths, who possessed a handgun and demanded money. When Mr. Minnig refused to

comply, the gunman pulled the trigger, but the weapon misfired. Minnig then told the assailant to "get out of here", and swung at defendant with his right arm. Defendant pulled the trigger again and, this time, the gun fired, hitting Minnig in the chest. After the victim was shot a second time, another young man appeared. He demanded and recieved money from Mr. Saunders. He also took the fur cape Mrs. Saunders had been wearing. After the shooting, Joseph Marshall, Kevin Marshall and James Jones ran back into the housing project.

Joseph and Kevin Marshall were both indicted for first degree murder. Defendants pleaded not guilty at their arraignment and the trial court appointed John M. Lawrence of the Orleans Indigent Defender Program to represent both defendants.

Four months before trial, Lawrence moved the trial court to appoint separate counsel for each defendant because, among other reasons, "[t] he interest of each defendant with respect to evidence, presentation of testimony, decision to take the stand or not, the presentation of a defense, accountability and effective assistance of counsel, are different. * * *"

Two months later, in conjunction with a motion to suppress hearing, Lawrence called the court's attention to the motion to appoint separate counsel. [1] The trial judge, without conducting a hearing to determine the existence of a conflict, denied the motion.

At trial James Jones testified, pursuant to a plea bargain agreement with the state, that he acted as a lookout for defendants and witnessed the murder. Jones testified that Joseph Marshall was the gunman and Kevin Marshall the second man.

Joseph Marshall did not take the stand in his own behalf, and neither the state nor the defense called Kevin Marshall as a witness. Defense counsel made at least two objections to the testimony of prosecution witnesses regarding the purported actions and statements of co-defendant Kevin Marshall.[2] At the trial's conclusion, the jury found defendant guilty of first degree murder and, following a penalty hearing, recommended that defendant be sentenced to death. Defendant filed a motion for a new trial and in arrest of judgment, again raising the claim that the multiple representation of himself and Kevin Marshall by a single appointed attorney over objection violated federal constitutional guarantees of effective assistance of counsel. The trial judge denied defendant's motion.

On appeal, defendant argues that the trial court committed reversible error by summarily overruling his pre-trial motion to appoint separate counsel because of possible conflict of interests. After reviewing the record and the applicable United States Supreme Court decisions, we conclude that we are compelled to reverse defendant's conviction, vacate his sentence and order a new trial.

The relationship between joint representation and ineffective assistance of counsel has been thoroughly examined by the United States Supreme Court in its opinions rendered in Holloway v. Arkansas, 435 U.S. 475, 95 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) and Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed.2d 333 (1980).

In *Holloway*, a public defender appointed to represent three defendants requested the appointment of separate counsel for each of the defendants three weeks prior to trial. After a hearing, the trial court denied the request. The defendant renewed the motion on the first day of trial, explaining that he could not cross-examine each client in behalf of the other co-defendants. The court again rejected counsel's request.

Because of alleged inconsistencies in the defendants' versions of the events surrounding the crime, the public defender refused to examine any of his clients and, instead, permitted them to testify in narrative form. The United States Supreme Court reversed defendants' convictions, holding that they were deprived of effective assistance of counsel. See Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va. L. Rev. 939 (1978).

Although the Supreme Court declined to adopt a constitutional rule barring joint representation in criminal cases, it overturned the defendants' convictions because counsel's motion, as an officer of the court, "brought home" the "possibility" of a conflict of interest. 435 U.S. at 485, 98 S. Ct. at 1179, 55 L. Ed.2d at 435. According to the majority opinion, the trial court's failure "either to appoint separate counsel or to take adequate steps to ascertain whether the risk [of a conflict of interest] was too remote to warrant separate counsel" constituted reversible error. 435 U.S. at 484, 98 S. Ct. at 1178–79, 55 L. Ed.2d at 434.

Thus, *Holloway* mandates that when counsel providing joint representation moves *before trial* for the appointment of separate counsel, the trial judge must either grant the request or investigate the risks of multiple representation if there is a *possibility* of conflict of interests. See also Tague, Multiple Representation and Conflicts of Interest in Criminal Cases, 67 Geo. L. J. 1075 (1979). The failure of the trial court to do either is a deprivation of the co-defendants' Sixth Amendment right to the effective assistance of counsel, requiring automatic reversal of any conviction obtained during the forced joint representation, even if the complaining co-defendant fails to show specific prejudice. 435 U.S. at 487–89, 98 S. Ct. at 1180–81, 55 L. Ed. 2d at 436–437.

In *Sullivan*, a co-defendant accepted representation

from the two attorneys retained by his two co-defendants. At no time did Sullivan or his lawyers object to the multiple representation. All three defendants were tried separately. Sullivan was the first of the defendants to come to trial. After his conviction, Sullivan moved for post-conviction relief, claiming that he was denied effective assistance of counsel because his attorneys represented conflicting interests.

The Supreme Court dismissed Sullivan's claim that he was deprived of his Sixth Amendment right to effective counsel. In articulating its unwillingness to find merit in petitioner's post-trial allegations, the high court concluded:

> We hold that the possibility of conflict of interest is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. 64 L.Ed.2d at 348.

Thus, contrary to the accused in *Holloway*, the defendant in *Sullivan* was required to show that he was actually prejudiced because of his attorney's multiple representation.

The instant case presents a situation that resembles both *Holloway* and *Sullivan*. As in *Holloway*, Marshall did not retain his counsel, but was represented by a court-appointed attorney. Further, Marshall's attorney voiced his concern of a possible conflict of interest well in advance of trial. Like *Sullivan*, Marshall was tried separately from his co-defendant and has not shown that he was actually prejudiced because of the joint representation. As a result, the merits of defendant's claim of ineffective counsel, in the present case, depends upon whether *Sullivan* modified *Holloway* by requiring defendants to show actual prejudice whenever a co-defendant is tried separately.

After carefully studying the *Holloway* and *Sullivan* decisions in pari materia, we conclude that the time at which a concern over the effects of multiple representation was raised was the determinative factor in the high court's apparently conflicting holdings.

When defendant raises a *pre-trial* objection because of a possible conflict of interest, *Holloway* requires the trial court to appoint separate counsel or take adequate steps to determine if the claimed risk is too remote. Failure to take either action warrants automatic reversal, even in the absence of specific prejudice. However, should the objection to multiple representation be made *after* trial, *Sullivan* is controlling and the defendant must show actual prejudice in support of his claim.

We recognize that the severance granted by the trial judge, in the instant case, made it highly unlikely that any conflict of interest could arise which would have inhibited counsel's representation *at trial.* The severance placed counsel in a more favorable position because of the knowledge he would gain through his representation of all defendants. As noted by Justice Frankfurter in his dissent in Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 87 L. Ed. 680 (1942), "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack."

Even so, *Holloway* did not expressly or impliedly limit its holding to multiple representation of co-defendants who are jointly tried. The presumed prejudice warranting automatic reversal arises before trial when the trial judge fails to either appoint separate counsel or to inquire into the matter adequately in response to a timely pretrial motion. According to *Holloway*, the chief evil of joint representation is its compulsion upon the defense lawyer to refrain from action in behalf of a client "not only at trial but also as to

possible pretrial plea negotiations and in the sentencing process." 55 L. Ed.2d at 438.

Though a severance was granted by the trial judge in *Sullivan*, it was not the crucial factor in the court's decision to require a defendant to show actual prejudice. As stated by the majority:

> In order to establish a violation of the Sixth Amendment, a defendant *who raised no objection at trial* must demonstrate that *an actual conflict of interest* adversely affected his lawyer's performance. (emphasis added) 64 L. Ed.2d at 346.

Further, in addressing defendant's claim that he was denied effective representation of counsel, the *Sullivan* court noted that the claim raised issues "expressly reserved" in *Holloway*. Thus, it is clear that the high court's opinion in *Sullivan* did not limit or modify its holding in *Holloway* concerning pretrial objections related to multiple representation.

Because defendant was the trigger man, it is almost impossible to conceive what pretrial advantage counsel would have lost for defendant by virtue of his representation of others. Nevertheless, the "high court", as this Court reads *Holloway*, has practically denied a trial judge any discretion when counsel, *before* trial, asserts a claim of conflict of interest except to appoint other counsel.

Accordingly, we conclude that the United States Supreme Court decision in Holloway v. Arkansas, supra, is controlling and compels us to reverse defendant's conviction, vacate his sentence, and order a new trial. [3]

REVERSED AND REMANDED.

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FOOTNOTES

[1] "I would like to comment briefly. I filed a Motion to have separate counsel appointed for each defendant under Holly v. Arkansas [sic]. Since I have statements made by both defendants we may have a problem as to how I will proceed with the defense when people are making statements against each other and against the interests of each other."

At a later hearing concerning a bail reduction and a motion to suppress, counsel reasserted his request that the court appoint separate counsel:

"The identification procedures here are such that I cannot call the co-arrestee or co-defendant since I also represent him and the source of this information leading to the arrest of Joseph Marshall is Kevin Marshall and being his counsel I cannot call him."

[2] During the testimony of one of the prosecution's witnesses, defense counsel moved for a mistrial, stating: "I object to any testimony about Kevin because I represent Kevin Marshall and I cannot call him in this matter. I move for a mistrial." The motion was denied.

[3] The defendant objected to certain comments made by the prosecutor during the sentencing hearing. The prosecutor's comments included a reference to automatic review of the propriety of the death penalty by this Court and the assertion that "somewhere down the line a Governor can sign a piece of paper and release Joseph Marshall back on an unsuspecting world." For purposes of the defendant's retrial, we refer to prosecutor to this Court's opinions in which death sentences were set aside because of such improper arguments. State v. Willie, _____ So. 2d _____ (La.

1981), No. 81–KA–0242; and State v. Lindsey, 404 So.2d 466 (La. 1981). The prosecutor also characterized the defendant as an "animal", an epithet which we have previously warned may constitute reversible error. State v. Grey, 351 So.2d 448 (La. 1977).

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WATSON, Justice, dissenting.

It is indeed difficult to understand why the trial court would not appoint separate counsel under the circumstances presented in this case. However, I disagree with the majority holding that prejudice is presumed. Before reversing the conviction, it is necessary to find prejudice to defendant's rights resulting from the failure to appoint separate counsel.

I reserve judgment on the question of the sentence, but I would affirm the conviction.
Therefore, I respectfully dissent.

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MARCUS, Justice (dissenting)

Holloway involved a situation where the defendant raised the issue of a conflict of interest prior to a *joint* trial. The Supreme Court held that no specific prejudice had to be shown on appeal. *Sullivan* involved a situation where the defendant did not raise the issue of a conflict of interest prior to trial, but each defendant was tried separately. The Supreme Court held that the possibility of a conflict of interest is not sufficient to impugn a criminal conviction. Rather, an "actual conflict of interest" must be shown before a conviction will be reversed because of multiple representation. The Court further stated that "*Holloway* reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest." The instant case involves a defendant who raised the issue of a conflict of interest prior to trial - - as in *Holloway* - - but who received a separate trial - - as in *Sullivan*. Thus, neither case is directly on point.

If *Sullivan* is controlling, the conviction should not be reversed because defendant has made no showing nor does he even allege any "actual conflict of interest" because of the joint representation. However, even assuming, as did

the majority, that *Holloway* is controlling, a reversal of a conviction is not automatic merely because the trial judge failed to appoint separate counsel. Under *Holloway*, the trial judge is required "either to appoint separate counsel *or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel.*" (Emphasis added.) I consider the granting of separate trials *in this case* to have been an adequate step in making the risk of conflict too remote to warrant separate counsel. The provision of separate trials removed the possibility of a conflict at the trial. Thus, only pretrial conflicts were possible in this case. As the majority notes, this defendant's role in the crime was that of the "trigger man." That fact alone renders the risk of pretrial conflict too remote to warrant separate counsel.

Accordingly, I respectfully dissent from the reversal of defendant's conviction and sentence.

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June 16, 1982

LEMMON, Justice, Dissenting.

When jointly represented defendants are tried separately, it is more logical for a reviewing court to apply *Sullivan's* requirement that defendant demonstrate an adverse effect on counsel's ability to perform than to predicate the decision on a distinction between *Sullivan* and *Holloway* based on whether defendant raises the allegation before or after trial. Since there was no showing that counsel's alleged "divided" loyalty actually impaired counsel's ability to represent a particular defendant *who was tried alone*, the conviction should be affirmed.

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

June 18, 1982

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Asst. District Attorney
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New Orleans, La. 70119

John Lawrence, Esq.
ORLEANS INDIGENT DEFENDER PROGRAM
2700 Tulane Ave., Rm. 112
New Orleans, La. 70119

Re: State of Louisiana vs. Joseph Marshall, No. 81-KA-0426

Dear Counsel:

Enclosed please find a News Release documenting this Court's denial of the application for rehearing, in the above referenced case.

This judgment is now final. By copy of this letter we are advising the Clerk of Court of the finality of this case and instructing them to do whatever is necessary to implement the judgment.

With kindest regards, I remain,

Very truly yours,

/s/ Frans J. Labranche, Jr.
Frans J. Labranche, Jr.
Clerk of Court

FJLJr:dac
cc: Hon. Alvin V. Oser
Hon. Edwin A. Lombard

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

June 22, 1982

Hon. Edwin Lombard
Clerk of Court
Criminal District Court
Parish of Orleans
2700 Tulane Ave.
New Orleans, La. 70119

Re: No. 81–KA–9426
State of La. vs. Joseph Marshall
(Criminal Dist. Court # 276–396)

Dear Mr. Lombard:

Enclosed please find copy of Motion and Order for Stay of Proceedings with regard to the above entitled matter, which is self-explanatory.

Please be guided accordingly.
With kindest regards, I remain,

Very truly yours,
Frans J. Labranche, Jr.
Clerk of Court
/s/ Dan B. Haggerty, Jr.
Dan B. Haggerty, Jr.
Deputy Clerk of Court

DBHJr./kf
Encl.
ccs: John Lawrence, Esq., Mrs. Louise Korns, Dwight Doskey, Esq. Hon. Alvin v. Oser, La. Dept. of Corrections

SUPREME COURT OF LOUISIANA

NO. 81-KA-0426

STATE OF LOUISIANA

VS.

JOSEPH MARSHALL

Appeal From The Criminal District Court, Parish of Orleans

PETITION OF STATE OF LOUISIANA FOR STAY OF PROCEEDINGS

Filed June 21, 1982

The State of Louisiana is aggrieved by this Court's denial of its Petition For Rehearing on June 18, 1982, in the captioned matter, and announces its intention to apply to the Supreme Court of the United States for a Writ of Certiorari to review this Court's reversal of Joseph Marshall's conviction of first degree murder.

To this end, the State of Louisiana respectfully asks this Honorable Court to stay all proceedings in this case for sixty days so that its Application for Certiorari may be lodged in the Supreme Court of the United States.

Respectfully submitted,

/s/ Louise Korns
LOUISE KORNS
ASSISTANT DISTRICT ATTORNEY
PARISH OF ORLEANS

ORDER

CONSIDERING THE FOREGOING, it is hereby ordered that all proceedings in this case be stayed for sixty days.

June 22, 1982
New Orleans

/s/ John A. Dixon, Jr.
CHIEF JUSTICE
Supreme Court of Louisiana
/s/ Dan B. Haggerty, Jr.
Dan B. Haggerty, Jr.
Deputy Clerk